

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline	)	
Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial	)	
Regulatory Review – Review of Computer	)	
III and ONA Safeguards and Requirements	)	
_____	)	

**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

Its Attorneys:

Lawrence E. Sarjeant  
Indra Sehdev Chalk

1401 H Street, NW, Suite 600  
Washington, D. C. 20005  
(202) 326-7248

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**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),<sup>1</sup> through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.415 and 1.419,<sup>2</sup> hereby submits its comments in the above-docketed proceeding. USTA supports the commencement of this rulemaking proceeding by the FCC in order for it to thoroughly examine “the appropriate legal and policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities.”<sup>3</sup>

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<sup>1</sup> USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA represents over 670 carrier members that provide a full array of voice, data and video services over wireline and wireless networks. USTA members support the concept of universal service, and its carrier members are leaders in the provision of advanced telecommunications services to American and international markets.

<sup>2</sup> 47 C.F.R. §§ 1.415 and 1.419.

<sup>3</sup> See *Appropriate Framework for Broadband Access; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 14, 2002) (*Wireline Broadband Access Notice*) at ¶ 1.

## SUMMARY

Data collected by the FCC and non-FCC sources demonstrate the competitive nature of the broadband market, particularly the broadband mass market.<sup>4</sup> Incumbent local exchange carriers (ILECs) do not have market power in the broadband market, and ILECs are non-dominant broadband service providers. Accordingly, the FCC cannot lawfully continue to impose substantial regulatory burdens upon ILEC mass market broadband services while imposing *de minimis*, if any, regulatory obligations on cable and other mass market broadband services. Such disparate treatment of ILECs is unjustified and places ILECs at a severe competitive disadvantage to their broadband competitors. The FCC has the ability to alleviate the inequity in this proceeding, and USTA urges the FCC to do so expeditiously.

The following policy positions are presented herein by USTA in response to the inquiries made by the FCC in the *Wireless Broadband Access Notice*. A comprehensive survey of the broadband market shows that several substitutable broadband platforms, including wireline, wireless, satellite and cable, are available to consumers.<sup>5</sup> The FCC should find that ILEC-provided retail and wholesale broadband services are non-dominant and not subject to mandatory tariffing or other dominant carrier regulatory requirements. Generally, the provision of wireline, broadband Internet access service over a provider's own facilities should be deemed to be an information service. The transmission component of a wireline broadband Internet access service that is provisioned over a broadband provider's own network is "telecommunications"

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<sup>4</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33 (rel. Feb. 6, 2002) (*Third Report*). See also Exhibit A (*Broadband Fact Report*) attached to the Comments of Verizon, filed on March 1, 2002, in *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC Broadband Notice*).

<sup>5</sup> See *id.*

and not a “telecommunications service.” In order to ensure parity in regulatory treatment among broadband platforms and service providers, the provision of stand-alone broadband transmission to an unaffiliated Internet service provider (ISP) should be deemed to be private carrier service and not common carrier service. Access by an ISP to the broadband network of a service provider with which it is unaffiliated (“open access”), should be encouraged but not mandated. In order to ensure effective advanced services deployment and reasonable pricing in their service areas, carriers eligible for participation in the NECA pools should be allowed to opt out of broadband deregulation. Further, such carriers should be allowed to have their broadband services treated as Title II common carrier services and be permitted to keep their broadband services in the NECA pools and tariffs. The broadband market, including ILEC-provided broadband services, should be found to be an interstate market and should not be subject to state regulation. All broadband service providers should be able to engage in market-based pricing for their broadband services. All providers of broadband service, regardless of the technology or platform used to provide the service, should be equally obligated to contribute to universal service support mechanisms.

## **DISCUSSION**

In May of 1999, USTA asked then FCC Chairman William Kennard to “commence a long overdue docket on convergence in the communications industry.”<sup>6</sup> In support of the request for a convergence proceeding, USTA observed:

Cable’s position as a provider of broadband local loop access for a wide variety of video, Internet and telecommunications services compels a reexamination of the assumption that local telephone companies control bottleneck or essential facilities that make them dominant in the local exchange and exchange access markets.

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<sup>6</sup> Letter to William Kennard, Chairman, Federal Communications Commission, from Roy Neel, President and CEO, United States Telephone Association, dated May 4, 1999, at 1.

We are now in a multi-network, multi-provider, multi-service, digital and broadband-based world that at a business and operating level is undifferentiated by old labels such as LEC, ILEC, CLEC, IXC, CMRS, CATV, ESP and ISP. It is only in the regulatory arena that some cling tenaciously to these labels when it proves convenient in securing a competitive advantage. The public interest demands, though, that the FCC and other regulators conform their regulations to the new realities of the communications market.<sup>7</sup>

With respect to broadband access to the Internet over wireline facilities, this proceeding holds great promise for creating a deregulatory framework that conforms to the realities of today's communications market. By placing ILEC broadband Internet access service on an equal, deregulated footing with high-speed access to the Internet over cable and other broadband platforms, the FCC will spur the deployment of broadband infrastructure, unleash vigorous head-to-head competition for broadband service providers, increase consumer choice, and stimulate the nation's economy.

While it has taken several years for USTA's 1999 request to receive a response from public policy decision-makers, recent regulatory and legislative initiatives demonstrate that there is a fast-growing realization that the public interest will best be served by harmonizing the regulatory scheme applied to competing broadband platforms. This proceeding and several other broadband-related proceedings initiated by the FCC show its commitment to "build the foundation for a comprehensive and consistent national broadband policy."<sup>8</sup> As FCC Chairman Michael K. Powell stated in a recent speech:

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<sup>7</sup> *Id.*

<sup>8</sup> *Wireline Broadband Access Notice* at ¶ 8. See *Incumbent LEC Broadband Notice and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (rel. Dec. 20, 2001) (*Triennial UNE Review Notice*).

[S]ound regulatory policy should, where appropriate, harmonize regulatory rights and obligations that are attached to the provision of similarly-situated services across different technological platform[s]. The convergence of industries, where advanced networks allow entities in traditionally distinct market segments to enter into each other's markets and into new similar markets, demands that we rationalize our regulatory regime to address these changes.<sup>9</sup>

At the state level, Oklahoma recently passed a law prohibiting the Oklahoma Corporation Commission from imposing any regulation upon a provider of high speed Internet access service or broadband service in its provision of the service, regardless of the technology or medium used to provide the service.<sup>10</sup> In Congress, the House of Representatives resoundingly passed the *Internet Freedom and Broadband Deployment Act* (HR 1542) earlier this year and Senators John Breaux and Don Nickels introduced the *Regulatory Parity Act of 2002* (S 2430) on April 29, 2002.

The *Regulatory Parity Act of 2002* would remedy the regulatory disparity that exists today by requiring that all broadband services and broadband access services be subject to the same regulatory requirements or no regulatory requirements. As a predicate for the remedial action mandated by the bill, it finds, among other things, that:

- Cable modem service, satellite service, and wireless services offered for high-speed access to the Internet are functionally equivalent to, and compete with, digital subscriber line and other broadband services offered by local exchange carriers.
- Providers of broadband services are subject to disparate regulatory treatment by the Federal Government and by State and local governments.

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<sup>9</sup> Remarks of FCC Chairman Michael K. Powell, April 30, 2002, to the U.S. Chamber of Commerce, Washington, D.C., at 5.

<sup>10</sup> Oklahoma Statutes, Title 17, new section 139.110. (A) The Oklahoma Corporation Commission shall not, by entering any order, adopting any rule, or otherwise taking any agency action, impose any regulation upon a provider of high speed Internet access service or broadband service in its provision of such service, regardless of technology or medium used to provide such service.

- The [Federal Communications] Commission should be required to ensure that providers of broadband services are regulated in an equivalent manner, regardless of the platform used to provide such services.
- Government regulation should not favor or advantage one class of competitors among competitors offering similar products or services.
- The deployment of digital subscriber line service has been restrained by regulatory requirements that are inappropriate for a competitive service offered by various non-dominant providers.
- Regulatory certainty and parity will provide incentives to increase deployment of high-speed Internet services, bringing the benefits of such services to communities in the form of enhancements in medicine, education, national security, work from home, and other benefits.
- When all providers of broadband services compete under the same rules, consumers will benefit from increased choices and lower prices.”<sup>11</sup>

These findings are supported by data collected by the FCC on broadband and advanced services, especially in the mass market.<sup>12</sup>

Already the critics of ILEC broadband deregulation and broadband regulatory parity are gathering and pressing their case for the status quo, or worse, for increased regulation on ILEC broadband services.<sup>13</sup> The consistent flaw in their arguments is that each group of critics fails to comprehensively address the level of competition that exists in the broadband market as experienced by consumers. Their view of broadband competition is myopic as it fails to recognize the various forms of intra-modal and inter-modal broadband competition that have been documented. USTA is not suggesting that all communities have access, or sufficient access, to broadband services today, although at least some form of broadband service is available to 80% of American homes. Nor is USTA suggesting that the FCC should be content

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<sup>11</sup> See **S. 2430, SEC. 2. FINDINGS**, introduced April 30, 2002, 107<sup>th</sup> CONGRESS, 2D Session.

<sup>12</sup> See *Third Report*.

<sup>13</sup> For example: Letter of April 30, 2002, from the National Association of Regulatory Utility Commissioners to the Honorable Trent Lott, Senate Minority Leader, asking that he oppose The Broadband Regulatory Parity Act of 2002; and Letter of April 24, 2002, from over 50 CLEC executives to President George W. Bush urging Administration



with the level of competition that exists today in the broadband market. The broadband services market is still in its developmental stage. Still, the FCC has recognized that there is reason to be encouraged “that the advanced services market continues to grow, and that the availability of and subscribership to advanced telecommunications has increased significantly [since its last report].”<sup>14</sup> The FCC has also found encouragement in “technological and industry trends, which indicate that alternative and developing technologies will continue to be made available to consumers

The FCC’s national broadband policy must be guided by the interests of consumers and not by the interests of ILEC competitors or state regulators. Their positions, if adopted, will only serve to further slow the rollout of broadband services by ILECs. This, in turn, will delay broader access to broadband services by the consumers and businesses that want access to them, as well as dampen competition to cable - - the market leader in the deployment of mass market broadband services by more than 2-1 over ILECs.”<sup>15</sup> The FCC need not fear, though, that deregulatory relief for ILEC broadband services will lead to a duopoly. As it has already determined:

There have been a number of developments in the technologies capable of supporting advanced services since the *Second Report*. Many of these technologies, including satellite and 3G wireless, appear to have significant potential for expanding the availability of advanced telecommunications to more Americans.<sup>16</sup>

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restraint on what is characterized as the FCC’s consideration of “one-sided policies that could squelch competition among local broadband providers and recreate a monopoly for broadband services.”

<sup>14</sup> *Third Report* at ¶ 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶ 7.

The time and circumstances are right for the FCC to move forward with broadband deregulation and USTA urges the FCC to do so.<sup>17</sup>

### **Consumers Have Choices for Mass Market Broadband Services**

Those that oppose deregulating ILEC mass market broadband service often attempt to convince public policy makers that there is very little competition for ILEC DSL services. They refuse to discuss the competition provided by other broadband platforms.<sup>18</sup> The entire focus of their discussion is their need to leverage their entry into the competitive broadband market on the broadband network investments made by ILECs. It is difficult to fathom how such critics could be perceived to have any credibility when “[h]igh speed Internet service via a cable modem is now available to more than 70 million U.S. households.”<sup>19</sup> As of November 2001, there were 6.4 million cable modem customers according to NCTA.<sup>20</sup> Yet, according to market research firm TeleChoice, as of September 2001, there were a little more than 3.8 million DSL lines installed.<sup>21</sup> In the *Third Report* the FCC recognized that consumers are seeing real broadband competition because “two [high-speed] service providers were reported in about 41 percent of zip codes, whereas only 18 percent of zip codes had more than two service providers in December 1999.”<sup>22</sup> It was further noted in the *Third Report* that “there are approximately 160

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<sup>17</sup> Qualified by the recognition that certain rural and high cost areas can present unique circumstances that require allowing LECs that are eligible for participation in the NECA pools to opt out of broadband deregulation and keep their broadband services in the NECA pools and tariffs.

<sup>18</sup> “Competitive providers are calling on the Administration to step away from efforts to change current regulations the would give the Bells a monopoly over advanced services and limit the ways in which competitive providers can reach consumers.” H. Russell Frisby, Jr., President CompTel. ALTS/CompTel press release, *Telecom CEOs Urge Bush Administration to Maintain Support for Local Telecom Competition and the Policy Framework of the '96 Telecom Act As the Best Approach to Spur Broadband Deployment*, released April 25, 2002.

<sup>19</sup> National Cable & Telecommunications Association (NCTA) press release, *Consumers Continue to Opt for Advanced Cable Services*, released November 13, 2002.

<sup>20</sup> *Id.*

<sup>21</sup> Newsbytes News Network, *DSL Growth On The Rise Again – Report*, November 28, 2001.

<sup>22</sup> *Third Report* at ¶ 105.

providers of high-speed lines in the nation[.]”<sup>23</sup> Even ALTS and CompTel would have to concede that there aren’t 160 RBOCs.

While it is clear that cable is the current front runner in the broadband mass market, cable modem service and DSL service are not the only broadband platforms offering high-speed Internet access to consumers.

Advances in technology continue to make advanced services more accessible to residential customers. In particular, the development of two-way satellite services has extended the availability of high-speed services to almost all residential customers in the United States. Other new technological developments, such as 3G Wireless, Helios, and DSL extenders, may extend the footprint of available advanced services to new residential customers.<sup>24</sup>

Consumers have choices today for broadband among different platforms and service providers.

As each day passes, more broadband options become available to consumers.

#### **ILEC-Provided Broadband Services are Non-dominant.**

Based upon the FCC’s own fact-finding that is most recently reflected in the *Third Report* and non-FCC data compilations such as the *Broadband Fact Report*, it is indisputable that ILECs have no market power in the broadband mass market, nor in the broadband larger business market, and are therefore non-dominant in both the retail and wholesale broadband markets. Accordingly, ILECs that provide retail or wholesale broadband service should not be subjected to dominant carrier regulation for those services. Further, ILECs should be permitted to forgo tariffing these services, as well as any other dominant carrier requirements currently applied to them for the provision of broadband services.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶ 107.

### **Internet Access Service Over a Provider's Own Facilities is an Information Service**

In the *Wireline Broadband Access Notice*, the FCC tentatively concludes that “wireline broadband Internet access service provided over a provider’s own facilities is an information service.”<sup>25</sup> USTA agrees with the FCC. Its analysis that the provision of Internet access service to an end user customer allows the customer “to run a variety of applications that fit under the characteristics stated in the information service definition”<sup>26</sup> is a reasonable reading of the relevant portions of the Communications Act. That interpretation results in the conclusion that an end user customer’s integration of a wireline broadband service with the information service functions utilized by the end user customer on the Internet makes the broadband platform more than just a transparent transmission path. It makes the broadband platform part of an integrated information service, at least from the customer’s viewpoint. USTA also agrees that this analysis is unaffected by the fact that the broadband Internet access service is being provided over the wireline carrier’s own broadband network. Since it is the functionality provided to the end user customer that determines the classification, it does not matter whether the same provider is providing both the transport and the Internet access or whether one service provider provides the transport and another the Internet access. In either case, the resulting classification of the integrated offering is that of an information service.

### **The Transmission Component of a Wireline Broadband Internet Access Service Provisioned Over a Broadband Providers Own Network is Telecommunications**

USTA agrees with the FCC that “as a logical extension of [its] determination that the provision of wireline broadband Internet access service over a provider’s own facilities is an

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<sup>25</sup> *Wireline Broadband Access Notice* at ¶ 24.

<sup>26</sup> *Id.* at ¶ 20.

information service, the transmission component of the end-user wireline Internet access service provided over those facilities is ‘telecommunications’ and not a ‘telecommunications service.’”<sup>27</sup>

### **The Provision of Stand-alone Broadband Transmission to an Unaffiliated ISP Is Private Carrier Service, Not Common Carrier Service**

USTA believes that one can distinguish the wholesale provision of broadband transport to an unaffiliated ISP, where the ISP bundles the broadband transport with its Internet access service for the purpose of offering its own integrated retail service, from the retail sale of broadband transport to the mass market. Given the exceedingly narrow scope of the class to which the transport is to be provided (that class solely being unaffiliated ISPs), USTA believes that there is not an offering of service to the public in the traditional sense and the arrangement is more closely related to private carriage.

### **Open Access Should Be Encouraged But Not Mandated**

Open access is not mandated for ILEC competitors in the broadband mass market. As a matter of equity and in order to avoid perpetuating unnecessary disparities among competitors, access by an ISP to the broadband network of a broadband service provider with which it is unaffiliated should be encouraged but not mandated.

### **Opting Out of Broadband Deregulation**

Certain rural and high cost areas can present unique circumstances that require taking a different approach to providing for the reasonable and timely deployment of broadband services. In some instances, the deregulation of broadband services may discourage rather than encourage broadband investment. Such a result would prove to be a very unfortunate, unintended consequence of deregulation. Accordingly, USTA believes that the FCC should permit carriers that are eligible for participation in the NECA pools and tariffs to opt out of broadband

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<sup>27</sup> *Id.* at ¶ 25.

deregulation. These carriers should be allowed to have their broadband service treated as a Title II common carrier service and be permitted to keep their broadband services in the NECA pools and tariffs. Nearly 500 rate-of-return carriers have elected to participate in NECA's DSL special access service tariff since it was introduced in 1999. Considering the potential impacts on such a large number of rate-of-return carriers, the FCC should accord these carriers the option of keeping their broadband services within Title II in order to ensure that no unintended disincentive for broadband investment is created.

### **The FCC Should Determine That the Broadband Market is Interstate And Not Subject to State Regulation**

The FCC should reaffirm its prior holding that DSL service used to provide access to the Internet is interstate in nature and subject to FCC jurisdiction. This determination is unaffected by a determination that broadband service used to provide Internet access is an information service. It is imperative that we have one national broadband policy and not multiple, and possibly inconsistent, state broadband policies. Providing states with the opportunity to assert jurisdiction over broadband will assure increased regulation and costs for carriers. Such a result would only serve to discourage ILEC broadband investment. The FCC has sufficient grounds upon which to retain exclusive jurisdiction over Internet-bound traffic, and it should do so.

### **Market-based Pricing**

As discussed above, the market for broadband services is competitive. ILECs are non-dominant in the broadband market. It is axiomatic that regulation is a surrogate for competition. Considering the level of competition that exists in the broadband mass market for high-speed access to the Internet, there is no reason to continue the imposition of dominant carrier pricing regulation on ILEC broadband services. ILECs should be free to engage in market-based pricing for their broadband service.

## **All Providers of Broadband Service Should be Obligated to Support Universal Service on a Competitively Neutral Basis**

It is absolutely essential that the FCC not allow for the undermining of the universal service program as a result of moving forward with the deregulation of ILEC broadband services. The deregulation of broadband and preservation of universal service should both be critical objectives for the FCC. Certainly, there are parts of the Nation that would be without affordable telephone service if the universal service high cost support mechanism was to lose substantial funding support as a result of the reclassification of broadband services from Title II to Title I. It seems that at least two possible approaches are open to the FCC that would allow it to move forward on broadband on a track that is largely consistent with the tentative conclusions presented in the *Wireline Broadband Access Notice*. It can conclude that it can reach the telecommunications that supports the information service in order to assert jurisdictional for the purpose of requiring a broadband service provider to contribute to universal services support mechanisms. Alternatively, it can conclude that its Title I jurisdiction is sufficiently expansive to empower it to impose Title II universal service support obligations on broadband services providers that are regulated under Title I. USTA is not recommending a particular approach for resolving this issue in these comments. USTA does consider the deregulation of broadband and the preservation of universal service as equally important goals. Neither goal should be achieved at the expense of the other.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

By: /s/Lawrence E. Sarjeant

Lawrence E. Sarjeant

Indra Sehdev Chalk

Its Attorneys

1401 H Street, NW, Suite 600

Washington, D.C. 20005

(202) 326-7300

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